No. 89-884

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1989

BYRON DANIEL CRAWFORD, M.D.,
Petitioner,

vs.

WORKERS' COMPENSATION APPEALS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION ONE

* ROBIN B. JOHANSEN
JOSEPH REMCHO
MARTIN BUCHANAN
REMCHO, JOHANSEN & PURCELL
220 Montgomery Street, #800
San Francisco, California 94104
Telephone: 415/398-6230

EDWARD M. ROSENFELD
DONALD G. NORRIS
PATTERSON, BELKNAP, WEBB & TYLER
1875 Century Park East, #950
Los Angeles, California 90067
Telephone: 213/557-1000

Counsel for Petitioner
* *Counsel of Record*

November 28, 1989

BOWNE OF SAN FRANCISCO, INC. • 180 NINTH ST. • S.F., CA 94103 • (415) 864-2300

QUESTION PRESENTED

Does the Due Process Clause prohibit a state agency from prosecuting a medical expert for criminal contempt for allegedly failing to comply with a rule of practice that specifically calls for a less drastic remedy (giving less weight to evidence) and that nowhere suggests that criminal contempt or any other penalty may be imposed?

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REPORTS OF OPINIONS BELOW

The opinion below of the Court of Appeal of the State of California, Second Appellate District, Division One is reported as *Crawford v. Workers' Compensation Appeals Board*, 213 Cal.App.3d 156 (1989) and is reprinted in Appendix A hereto. No other opinions below are reported in any official or unofficial reporter.

STATEMENT OF JURISDICTION

This Court's jurisdiction is founded upon 28 U.S.C. section 1257(a), and based specifically upon a federal due process claim raised by petitioner in the state courts of California. Petitioner seeks review of the judgment of the Court of Appeal of the State of California, Second Appellate District, Division One, which became final on July 13, 1989. Petitioner sought rehearing of the Court of Appeal's decision, which was denied in a written

order dated July 12, 1989, and subsequently filed a timely petition for review by the California Supreme Court, which was denied on August 31, 1989. The 90-day time limit for filing a petition for writ of certiorari, 28 U.S.C. section 2101(c), did not begin to run until the California Supreme Court denied the petition for review. *Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U.S. 157, 160 (1954); *American Railway Express Co. v. Levee*, 263 U.S. 19, 21 (1923); *see also* R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice*, section 6.2 at 312 (6th ed. 1986).

CONSTITUTIONAL PROVISIONS, LAWS, AND REGULATIONS INVOLVED

1. Due Process Clause, United States Constitution, Amendment XIV, section 1:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. Rule 10606, California Workers' Compensation Appeals Board, Cal. Code Regs., tit. 8, section 10606:

> The Workers' Compensation Appeals Board favors the production of medical evidence in the form of written reports. Direct examination of a medical witness will not be received at a hearing except upon a showing of good cause and written notice to the parties filed and served at least 20 days before the hearing.
>
> These reports should include where applicable:
>
> (a) the date of the examination;
>
> (b) the history of the injury;
>
> (c) the patient's complaints;
>
> (d) source of all facts set forth in the history of complaints;
>
> (e) findings on examination;

(f) opinion as to the extent of disability and work limitations, if any;

(g) cause of the disability;

(h) medical treatment indicated;

(i) opinion as to whether or not permanent disability has resulted from the injury and whether or not it is stationary. If stationary, a description of the disability with a complete evaluation;

(j) the reasons for the opinions; and,

(k) the signature of the physician.

If any person other than the physician who has signed the report has participated in the examination of the injured employee or in the preparation of the report, the name or names of such persons and their role shall be set forth, including the name of person or persons who have taken the history, have performed the physical examination, have drafted, composed or edited the report in whole or in part.

In death cases, the reports of non-examining physicians may be admitted into evidence in lieu of oral testimony.

Failure to comply with the requirements of this section will not make the report inadmissible but will be considered in weighing such evidence.

3. California Code of Civil Procedure, section 1209(a):

(a) The following acts or omissions in respect to a court of justice, or proceedings therein, are contempts of the authority of the court:

1. Disorderly, contemptuous, or insolent behavior toward the judge while holding the court, tending to interrupt the due course of a trial or other judicial proceeding;

2. A breach of the peace, boisterous conduct, or violent disturbance, tending to interrupt the due course of a trial or other judicial proceeding;

3. Misbehavior in office, or other willful neglect or violation of duty by an attorney, counsel, clerk, sheriff, coroner, or other person, appointed or elected to perform a judicial or ministerial service;

4. Abuse of the process or proceedings of the court, or falsely pretending to act under authority of an order or process of the court;

5. Disobedience of any lawful judgment, order, or process of the court;

6. Rescuing any person or property in the custody of an officer by virtue of an order or process of such court;

7. Unlawfully detaining a witness, or party to an action while going to, remaining at, or returning from the court where the action is on the calendar for trial;

8. Any other unlawful interference with the process or proceedings of a court;

9. Disobedience of a subpoena duly served, or refusing to be sworn or answer as a witness;

10. When summoned as a juror in a court, neglecting to attend or serve as such, or improperly conversing with a party to an action, to be tried at such court, or with any other person, in relation to the merits of such action, or receiving a communication from a party or other person in respect to it, without immediately disclosing the same to the court;

11. Disobedience by an inferior tribunal, magistrate, or officer, of the lawful judgment, order, or process of a superior court, or proceeding in an action or special proceeding contrary to law, after such action or special proceeding is removed from the jurisdiction of such inferior tribunal, magistrate, or officer.

STATEMENT OF THE CASE

Petitioner, Dr. Byron Crawford, is a licensed medical doctor and psychiatrist who provides attorneys with medical reports for use in workers' compensation proceedings in California. The

attorneys then review and file the reports in the workers' compensation proceeding. In September 1986, a workers' compensation judge referred Dr. Crawford to the Workers' Compensation Appeals Board ("WCAB" or "Board") regarding possible contempt proceedings for failure to comply with Rule 10606 of the Board's rules of practice and procedure. That rule governs the content of medical reports submitted to the Board and states in pertinent part:

> If any person other than the physician who has signed the report has participated in the examination of the injured employee or in the preparation of the report, the name or names of such persons and their role shall be set forth, including the name of the person or persons who have taken the history, have performed the physical examination, have drafted, composed or edited the report in whole or in part.
>
> * * *
>
> *Failure to comply with the requirements of this section will not make the report inadmissible but will be considered in weighing such evidence.*
>
> Cal. Adm. Code, tit. 8, § 10606 (emphasis added).

Nearly twenty months later, on April 29, 1988, the Board issued an Accusation, Citation and Order to Show Cause (the "Accusation"), which charged Dr. Crawford with 36 counts of indirect contempt. (Exh. A to Pet. for Writ of Prohibition and/or Mandate.) The Board appointed a Special Prosecutor to prosecute the case.

Eighteen of the 36 counts in the Accusation charged that Dr. Crawford willfully violated Rule 10606 by failing to identify persons who took histories for, or assisted in preparing or editing seventeen medical reports completed in 1985 or 1986 and *1,000 other unidentified reports on 1,000 "Doe" applicants*. The Accusation charged that this conduct constituted contempt as defined by subdivision (a)(5) of section 1209 of the California Code of Civil Procedure ("Disobedience of any lawful judgment, order, or process of the court").

An additional 14 counts (each captioned "deceit") charged that Dr. Crawford's failure to identify the persons referred to in the first 18 counts brought under Rule 10606 constituted willful misrepresentations to the Board that petitioner alone took the histories or prepared the medical reports in question. This conduct was charged as contempt under subdivisions (a)(4) and (a)(8) of the same section ("Abuse of the process or proceedings of the court, or falsely pretending to act under authority of an order or process of the court" and "Any other unlawful interference with the process or proceedings of a court").

The remaining four counts charged "deceit" due to allegedly inaccurate statements made in medical reports, also bearing dates in 1985 and 1986, which were filed in three compensation cases. This conduct was also charged as contempt under subdivisions (a)(4) and (a)(8) of section 1209. Petitioner has already undergone two days of trial on one of these counts before a Worker's Compensation judge, who concluded that the error was not willful and refused to refer petitioner to the Board on a contempt citation. The Board overruled the judge and included the count among those charged.

Upon first learning of the existence of Rule 10606 at the time of his deposition in late August 1986, Dr. Crawford took steps to correct reports filed in pending cases. He has complied with the rule since.

The Board assigned the matter to Commissioner Donna Alyson Little for hearing. Petitioner moved to dismiss the Accusation, arguing, among other things, that the prosecution violated his due process rights because Rule 10606 is not sufficiently definitive to serve as a basis for contempt. (Mot. to Dismiss, Exh. C. to Pet. for Writ of Prohibition and/or Mandate at 23-24.) On July 29, 1988, Commissioner Little dismissed only the two "1,000 Doe applicant" counts, denying the remainder of petitioner's motion to dismiss, without prejudice to its renewal at the end of trial as to the Rule 10606 counts. (*Id.* at Exh. F; Appendix B at A-17.)

On August 19, 1988, Dr. Crawford filed a petition for writ of prohibition and/or mandate in the Second District Court of Appeal to prohibit the Board from proceeding to trial on the

remaining 34 counts. He again raised the due process issue previously raised before the Board. (MPA in Support of Petition for Writ of Prohibition and/or Mandate at 26-27.) On October 21, 1988, the Court of Appeal issued a one-sentence denial of that petition. (Appendix C at A-18.) Petitioner then sought review in the California Supreme Court, which granted his petition on December 16, 1988, and transferred the matter back to the Second District Court of Appeal with instructions to issue an alternative writ to be heard before that court. (Appendix D at A-19.)

On June 13, 1989, in a published opinion, the Court of Appeal denied the petition for writ of prohibition. With respect to the due process issue, the Court of Appeal held:

> Nor is there any merit to petitioner's further assertion that rule 10606 is insufficient to apprise one of the possibility of a contempt citation for violating its provisions. Although rule 10606 does not specify contempt as a sanction for noncompliance, WCAB rule 10562 (Cal. Code Regs., tit. 8, ch. 4.5, § 10562) regarding failure to appear at a hearing similarly does not specify contempt as a sanction; yet, failure to comply with rule 10562 can result in a contempt finding. (*In re Hustedt* (1976) 41 Cal.Comp.Cases 501, writ den.; Cal. Workers' Compensation Practice (Cont.Ed.Bar 1985) § 6.38, p. 217.)

(Appendix A at A-12.)

Dr. Crawford filed a timely petition for rehearing and/or modification of the Court of Appeal's opinion, again asserting that due process prohibits imposition of contempt for violation of a rule that gives no warning it may form the basis for contempt and that prescribes lesser sanctions for its violation. (Petition for Rehearing and/or Modification of Opinion at 21-26.) The Court of Appeal denied the petition for rehearing. (Appendix G at A-22-23.)

On July 24, 1989, Dr. Crawford filed a petition for review of the Court of Appeal's judgment and decision in the California Supreme Court, again raising the due process issue. (Petition for Review of the Decision of the Court of Appeal at 11-15.) The

California Supreme Court denied the petition for review on August 31, 1989. (Appendix E at A-20.)

On September 26, 1989, the Governor of California signed into law legislation that prohibits anyone other than the physician who signs the medical-legal report from examining the patient or participating in the non-clerical preparation of the report and that specifically provides:

> (e) Failure to comply with the requirements of this section shall make the report inadmissible as evidence and shall eliminate any liability for payment of any medical-legal expense incurred in connection with the report.
>
> (f) Knowing failure to comply with the requirements of this section shall subject the physician to a civil penalty of up to one thousand ($1,000) for each violation to be assessed by a workers' compensation judge or the appeals board.
>
> (g) A medical-legal report of any physician who is assessed a civil penalty under this section shall not be admissible in any proceeding of the appeals board.
>
> (h) Knowing failure to comply with the requirements of this section shall subject the physician to contempt pursuant to the judicial powers vested in the appeals board.
>
> (Cal. Labor Code § 4628, effective January 1, 1990.)

ARGUMENT

Fair warning that one's conduct may be punished as a crime is a basic and essential requirement of due process. *Bouie v. City of Columbia*, 378 U.S. 347, 350-51 (1964). The WCAB rule that forms the basis for Dr. Crawford's criminal contempt prosecution provides no fair warning that its violation could possibly be criminal, or even that its requirements are mandatory. The contempt prosecution therefore violates due process of law.

This Court has consistently recognized that fair warning "is fundamental to our concept of constitutional liberty." *Marks v. United States*, 430 U.S. 188, 191 (1977); *see United States v. Harriss*, 347 U.S. 612, 617 (1954); *McBoyle v. United States*, 283

U.S. 25, 27 (1931). This basic tenet of due process applies as forcefully to criminal contempt proceedings as any other criminal prosecution.[1] "Criminal contempt is a crime in the ordinary sense; it is a violation of the law, a public wrong which is punishable by fine or imprisonment or both." *Bloom v. Illinois*, 391 U.S. 194, 201 (1968). Faced with potential loss of liberty and property, a criminal contempt defendant is entitled to "all the procedural protections worked out carefully over the years and deemed fundamental to our system of justice." *Id.* at 208. Fair warning that one's conduct may be penalized as a crime is surely one of the most basic protections "deemed fundamental to our system of justice."[2]

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[1] Although the WCAB has persistently attempted to label the proceeding against Dr. Crawford as "quasi-criminal," both the Board and the Court of Appeal acknowledge that the proceeding is not one for civil contempt. WCAB Answer to Petition for Rehearing at 25-26; Appendix A at A-7 [213 Cal.App.3d at 165] This Court has recently rejected the "quasi-criminal" label as a basis for determining what due process rights are due a contempt defendant. *See Hicks on Behalf of Feiock v. Feiock*, ___ U.S. ___, 108 S.Ct. 1423, 1434 (1988). All contempt proceedings are either criminal in the sense that they impose determinate sentences in order to punish past conduct, or civil in the sense that they impose conditional sentences that may by purged by complying with an outstanding court order or decree. *See id.* at 1429-32; *Bessette v. W.B. Conkey Co.*, 194 U.S. 324, 327-28 (1904). The contempt proceeding against Dr. Crawford is clearly criminal in its nature. The WCAB seeks to punish Dr. Crawford for alleged past disobedience of one of its rules; it does not seek to compel compliance in any pending workers' compensation case. The purpose of the proceeding is to subject Dr. Crawford to an unconditional sentence of fines and/or imprisonment for past conduct. *See* Cal. Code Civ. P. section 1218.

[2] This Court has held that numerous other due process protections apply to criminal contempt proceedings. *See, e.g., Bloom v. Illinois*, 391 U.S. at 208 (right to jury trial); *In re Bradley*, 318 U.S. 50, 52 (1943) (double jeopardy); *Blackmer v. United States*, 284 U.S. 421, 440 (1932) (notice and opportunity to be heard); *Cooke v. United States*, 267 U.S. 517, 537 (1925) (notice of charges, reasonable opportunity to respond, assistance of counsel, and right to call witnesses); *Gompers v. Buck Stove & Range Co.*, 221 U.S. 418, 444 (1911) (presumption of inno-

WCAB Rule 10606 provides no warning whatsoever that its violation could be punished as criminal contempt.[3] On the contrary, the rule plainly states that if a physician fails to comply, his medical report may be given less weight *but will not be rendered inadmissible.* Cal. Code Regs., tit. 8, section 10606.[4] How could any physician possibly be expected to guess that even though his report is *admissible* in a workers' compensation proceeding, he may nevertheless be held in criminal contempt for submitting it? A more blatant denial of fair warning could hardly be imagined.

Rule 10606 not only fails to give fair warning of any criminal offense, but it affirmatively misleads the physician into believing that he is dealing with a discretionary rule of evidence rather than a mandatory requirement subjecting him to possible fine and imprisonment. At most, it suggests that the physician might be called upon to defend the weight of his report in the tribunal for which it was prepared. By its specificity, it rules out any reasonable interpretation that the physician must also be prepared to defend himself in a criminal contempt proceeding.

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cence, guilt beyond a reasonable doubt, and privilege against self-incrimination).

[3] As noted above, the California Legislature recently amended the state Labor Code to provide unequivocal warning that knowing failure to comply with the disclosure requirements regarding medical-legal reports may constitute contempt and to make inadmissible reports filed in violation of the requirements. Cal. Labor Code § 4628.

[4] The Court of Appeal mistakenly stated in its opinion: "Failure to comply with this requirement renders the report inadmissible if it is not the report of an examining or attending physician." (Appendix A at A-11.) This statement confuses Rule 10606 with a separate and independent statutory provision contained in California Labor Code section 5703(a), which provides that only the medical reports of "attending or examining physicians" may be received as evidence in workers' compensation proceedings. Contrary to the Court of Appeal's opinion, it is not failure to comply with Rule 10606 that renders inadmissible the report of a non-attending or non-examining physician. Labor Code section 5703(a) bars the admission of such a report whether or not it complies with Rule 10606.

The California Legislature's recent amendments to the state Labor Code confirmed the lack of warning afforded by Rule 10606. The clarity with which the Legislature spelled out the consequences of a knowing violation of the new provisions regarding disclosure in medical-legal reports contrasts sharply with the rule's provision that failure to comply with its requirements "will not make the report inadmissible but will be considered in weighing such evidence." (WCAB Rule 10606.) The Legislature's wholesale revision and codification of the rule regarding disclosure is a substantive change in the law [5] that makes clear the inadequacies of the Board's rule as a basis for contempt.

The requirement of fair warning means that a statute may not be given an unforeseeable and unexpectedly broad judicial interpretation to punish prior conduct criminally. *Douglas v. Buder,* 412 U.S. 430, 432 (1973) (per curiam). Just as a state legislature is barred from passing retroactive criminal laws, U.S. Const., art. I, section 9(3), so a state court "is barred by the Due Process Clause from achieving precisely the same result by judicial construction." *Bouie v. City of Columbia, supra,* 378 U.S. at 353-54. The Court of Appeal's decision that Rule 10606 may form the basis for criminal contempt achieves precisely this forbidden result.

The implications of the Court of Appeal's decision are staggering. Violation of any rule of evidence or practice could be punished criminally, even if the rule itself specifically sets forth nonpunitive remedies for its violation. For example, failure to comply with Rule 15 of the California Rules of Court regarding the form and length of briefs filed could subject a party or attorney to contempt without any prior warning, despite the fact that Rule 18 clearly sets forth only the nonpunitive remedies of returning the brief to counsel for correction, ordering the brief stricken from the files, or simply disregarding the defects.

"The judicial contempt power is a potent weapon. When it is founded upon a decree too vague to be understood, it can be a

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[5] *See Subsequent Injuries Fund v. Industrial Accident Commission,* 59 Cal.2d 842, 843-44 (1963); *Twin Lock v. Superior Court,* 52 Cal.2d 754, 760-61 (1959).

deadly one." *Internat'l Long. Ass'n v. Philadelphia Marine Trade Ass'n,* 389 U.S. 64, 76 (1967). In this case, the WCAB's exercise of contempt power is all the more deadly, because, even worse than being founded upon a rule too vague to be understood, it is founded upon a rule so specific that it affirmatively misleads the reader. Where, as here, the reader is a lay person, the problem is compounded, and the result is doubly unfair.

The stakes in this matter are high. At issue is the fate of a man's professional livelihood and reputation and the alleged offenses for which they can be placed in jeopardy. Petitioner has already been irreparably damaged by language in the Court of Appeal's opinion that effectively prejudges his guilt before he has had the opportunity to answer the charges against him or present evidence and testimony on his own behalf.[6] He has lost business, and insurers have refused to pay for reports prepared by him that unquestionably satisfy the requirements of Rule 10606. Unless these proceedings are terminated, petitioner and other forensic experts like him will be unwilling to proffer their expertise to a system that affords them no warning as to when they may be held in contempt or why.

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[6] *See* Appendix A at A-13 (stating that petitioner engaged in "factually substantiated misconduct in disregarding rule 10606") and A-14 (characterizing as "specious" petitioner's contention that he did not have knowledge of the WCAB rule's requirements because he had been submitting medical evaluation reports in workers' compensation proceedings since 1978 and he stated in deposition that he had heard of the rule; in fact, he learned of the rule on the morning of his deposition).

CONCLUSION

Certiorari should be granted because the California Court of Appeal "has decided a federal question in a way in conflict with applicable decisions of this Court." Supreme Court Rule 17.1(c).

The opinion below ignores controlling precedents of this Court establishing beyond any doubt that due process of law requires fair warning that one's conduct may be punished criminally. It expands the scope of criminal contempt to permit fines and jail sentences for the violation of virtually any rule of evidence or practice, even if the rule specifies purely nonpunitive remedies for its violation. It contravenes principles "fundamental to our concept of constitutional liberty." *Marks v. United States*, 430 U.S. 188, 191 (1977). It should be reversed.

Respectfully submitted,

ROBIN B. JOHANSEN
JOSEPH REMCHO
MARTIN BUCHANAN
REMCHO, JOHANSEN & PURCELL
220 Montgomery Street, #800
San Francisco, California 94104
Telephone: 415/398-6230

EDWARD M. ROSENFELD
DONALD G. NORRIS
PATTERSON, BELKNAP, WEBB & TYLER
1875 Century Park East, #950
Los Angeles, California 90067
Telephone: 213/557-1000
Counsel for Petitioner

November 28, 1989

(Appendices Follow)

Appendix A

In the Court of Appeal of the State of California

Second Appellate District

Division One

No. B036621
(W.C.A.B No. Misc. 185)

Bryon Daniel Crawford, M.D.
Petitioner,

v.

Workers' Compensation Appeals Board,
Repondent.

FILED
June 13, 1989

Original Proceeding to prohibit the Workers' Compensation Appeals Board from further contempt proceedings against petitioner. Writ denied.

Patterson, Belknap, Webb & Tyler, Edward M. Rosenfield, Helmut F. Furth, Donald G. Norris, Roberta M. Klein and Roger M. Rosen for Petitioner.

Richard W. Younkin and William B. Donohoe for Respondent.

INTRODUCTION

Petitioner Byron Daniel Crawford, M.D., seeks a writ of prohibition, or in the alternative a writ of mandate, to restrain further contempt proceedings against him by respondent Workers' Compensation Appeals Board (WCAB).

BACKGROUND

Dr. Crawford is a psychiatric expert witness specializing in stress-related and other mental disorders. Through an alter ego corporation, he has been providing medical evaluation reports

submitted in workers' compensation cases since 1978. The corporation employs approximately 30 persons to take medical histories and write the medical evaluation reports. Dr. Crawford is the sole physician employed by the corporation. Some of the employees are psychologists. The corporation generates approximately 50 to 80 reports each week. All of the reports are signed by Dr. Crawford.

In 1986 several persons brought to the WCAB's attention deficiencies in Dr. Crawford's reports; and in September 1986 a workers' compensation judge (WCJ), based on testimony before her in *Frances Morales v. U.S. Borax*, WCAB No. 84 LA 515162, referred Dr. Crawford to the WCAB regarding possible contempt. After a complex and extensive investigation, the WCAB on April 29, 1988, issued an accusation, a citation, and an order to show cause charging Dr. Crawford with 36 counts of contempt.

Dr. Crawford moved to dismiss the order to show cause. A WCAB commissioner granted the motion as to two counts (33 and 34) without prejudice to renewal and set the matter for hearing of the remaining counts.

Dr. Crawford then petitioned this court for a writ of prohibition restraining further proceedings by the WCAB. We initially denied the petition; however, the Supreme Court granted review and transferred the matter to this court with directions to issue an alternative writ to be heard before this court. We issued an alternative writ requiring the WCAB either to desist from further proceedings in the matter or in the alternative to show cause why a peremptory writ restraining the WCAB from further proceedings in the matter should not issue.

ACCUSATION AND ORDER TO SHOW CAUSE

The accusation and order to show cause are supported by extensive affidavits, declarations, deposition testimony of Dr. Crawford and other witnesses, and medical evaluation reports signed by Dr. Crawford in numerous cases involving claims of injured workers for compensation benefits.

In essence, 18 of the counts charge Dr. Crawford with willful violation of California Code of Regulations, title 8, chapter 4.5, section 10606 (rule 10606) in failing to identify the persons who took the medical histories and assisted in preparing and writing 17 medical evaluation reports submitted in workers' compensation cases in 1985 and 1986.[1] An additional 13 counts charge Dr. Crawford with deceit in failing to identify the persons who prepared medical reports and in willfully misrepresenting to the WCAB that Dr. Crawford alone took medical histories and prepared the reports. As to these 31 counts based in essence on

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[1]Rule 10606 provides: "The Workers' Compensation Appeals Board favors the production of medical evidence in the form of written reports. Direct examination of a medical witness will not be received at a hearing except upon a showing of good cause and written notice to the parties filed and served at least 20 days before the hearing.

"These reports should include where applicable:

"(a) the date of the examination;

"(b) the history of the injury;

"(c) the patient's complaints;

"(d) source of all facts set forth in the history of complaints;

"(e) findings on examination;

"(f) opinion as to the extent of disability and work limitations, if any;

"(g) cause of the disability;

"(h) medical treatment indicated;

"(i) opinion as to whether or not permanent disability has resulted from the injury and whether or not it is stationary. If stationary, a description of the disability with a complete evaluation;

"(j) the reasons for the opinions; and,

"(k) the signature of the physician.

"If any person other than the physician who has signed the report has participated in the examination of the injured employee or in the preparation of the report, the name or names of such persons and their role shall be set forth, including the name of person or persons who have taken the history, have performed the physical examination, have drafted, composed or edited the report in whole or in part.

"In death cases, the reports of non-examining physicians may be admitted into evidence in lieu of oral testimony.

"Failure to comply with the requirements of this section will not make the report inadmissible but will be considered in weighing such evidence."

violation of rule 10606, it is alleged that Dr. Crawford's conduct constituted contempt under Code of Civil Procedure section 1209, subdivisions (a)(4), (5), and (8).[2] The remaining five counts charge "deceit" due to misrepresentations made in medical evaluation reports signed by Dr. Crawford submitted in workers' compensation cases in 1985 and 1986.

For example, one of these five counts (27) in essence charges that Dr. Crawford filed false medical reports and liens in *Peter Padilla v. California Commerce Bank; Mission Insurance Co.*, WCAB No. 84 LA 514764, for psychotherapy services rendered to applicant Padilla on dates after his death, the medical reports and liens being signed by Dr. Crawford only, without assistance of any other person. Another count (35) charges that Dr. Crawford filed false medical reports and liens in two other workers' compensation cases (*Robert J. Kelley v. Panama Moving and Storage*, WCAB No. 85 LA 525604, and *Robert J. Kelley v. Goldrich & Kest Management*, WCAB Nos. 85 LA 542858, 85 LA 542859, 85 SBR 113311), alleging in essence that a few months after Dr. Crawford filed medical reports and liens in the first *Kelley* case to the effect applicant Kelley had undergone eight psychotherapy sessions in 1985 and was evaluated as totally disabled psychiatrically, Dr. Crawford filed medical reports and liens in the second *Kelley* case to the effect that applicant Kelley had never filed a previous workers' compensation claim, had never previously undergone psychiatric treatment, and had no previous treatment for mental or emotional problems.

Two counts charge in essence that Dr. Crawford willfully violated rule 10606 in connection with medical evaluation reports for 1,000 "Doe" injured workers in other workers' compensation cases. The WCAB dismissed these Doe counts (33 and 34) without prejudice to renewal.

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[2] Code of Civil Procedure section 1209 provides: "(a) The following acts or omissions in respect to a court of justice, or proceedings therein, are contempts of the authority of the court: . . . [¶] 4. Abuse of the process or proceedings of the court; [¶] 5. Disobedience of any lawful . . . order, or process of the court; . . . [¶] 8. Any other unlawful interference with the process or proceedings of a court; . . .

Based on the accusation and accompanying exhibits, the WCAB ordered that Dr. Crawford appear before a WCAB commissioner at a certain time and place and show cause, if any, why he should not be held in contempt pursuant to Labor Code section 134.

DISCUSSION

We address the issues in accordance with the principle that the Supreme Court's transfer order does not *ipso jure* establish petitioner is entitled to the relief sought and the Supreme Court's actions means only that this court must decide the issues presented. (*Popelka, Allard, McCowan & Jones v. Superior Court* (1980) 107 Cal.App.3d 496, 500.)

We first note that the California Workers' Compensation Act (Lab. Code, § 3200 et seq.) is a statutory system enacted pursuant to constitutional grant of plenary power to the Legislature to establish a complete and exclusive system of workers' compensation including "full provision for vesting power, authority and jurisdiction in an administrative body with all the requisite governmental functions to determine any dispute or matter arising under such legislation, to the end that the administration of such legislation shall accomplish substantial justice in all cases expeditiously, inexpensively, and without incumbrance of any character; all of which matters are expressly declared to be the social public policy of this State. . . ." (Cal. Const., art. XIV, § 4; Lab. Code, § 3201; see *Graczyk v. Workers' Comp. Appeals Bd.* (1986) 184 Cal.App.3d 997, 1002.)

The Legislature has vested all judicial powers under the Workers' Compensation Act in the WCAB (Lab. Code, § 111), including the power to issue all necessary process in proceedings for contempt. (Lab. Code, § 134; *Morton v. Workers' Comp. Appeals Bd.* (1987) 193 Cal.App.3d 924, 928; *Rowen v. Workers' Comp. Appeals Bd.* (1981) 119 Cal.App.3d 633, 639; *Marcus v. Workmens' Comp. Appeals Bd.* (1973) 35 Cal.App.3d 598, 604.) As stated in *Lipsey v. Danish Convalescent Home et al.* (1986) 51 Cal.Comp.Cases 443, 447 (in bank), the WCAB is authorized to exercise judicial power in all disputes arising under the Workers'

Compensation Act as a constitutional court subject to general legal principles which circumscribe and regulate the judgments of all judicial tribunals and in general has inherent power to control its practice and procedure to prevent frustration, abuse, or disregard of its processes.

In vesting the WCAB with the power to punish contempt, the Legislature specified that the WCAB or any member thereof "may issue . . . all necessary process in proceedings for contempt, in like manner and to the same extent as courts of record." (Lab. Code, § 134; *Morton v. Workers' Comp. Appeals Bd., supra*, 193 Cal.App.3d at p. 928.) Consequently, the WCAB must follow the applicable provisions of the Code of Civil Procedure pertaining to contempts (Code Civ. Proc., § 1209 et seq.); and when the alleged contempt is not committed in the WCAB's presence, the contempt proceedings are in the nature of indirect contempt, the WCAB must proceed by way of order to show cause supported by affidavit (Code Civ. Proc., § 1212), and the alleged contemner is entitled to appear before and be heard by the WCAB. (*Morton v. Workers' Comp. Appeals Bd., supra,* 193 Cal. App.3d at p. 928; *Rowen v. Workers' Comp. Appeals Bd., supra,* 119 Cal.App.3d at pp. 639, 643; *Marcus v. Workers' Comp. Appeal's Bd., supra,* 35 Cal.App.3d at p. 605; see *Arthur v. Superior Court* (1965) 62 Cal.2d 404, 408-409.)

With these principles in mind, we address the issues raised by petitioner.

1. Statute of Limitations

In the instant petition, petitioner places primary emphasis on Penal Code section 802 in support of his contention the contempt proceedings are barred by the one-year statute of limitations. In his reply brief, however, he appears to shift emphasis to Code of Civil Procedure section 340, subdivision 2, in this regard, noting that even if the herein contempt proceeding is not criminal in nature but merely quasi-criminal, then section 340, subdivision 2, applies.[3] (*Alpine Palm Springs Sales, Inc. v. Superior Court*

[3] Penal Code section 802 provides: "(a) Except as provided in subdivision (b), prosecution for an offense not punishable by death or

(1969) 274 Cal.App.2d 523.) Thus, petitioner asserts: "In any event, the question whether the present proceedings are criminal in nature or only 'quasi criminal' is largely irrelevant because it is obvious that the Legislature meant to impose a one-year statute or limitations in either event."

Although contempt proceedings are quasi-criminal in nature (*Raiden v. Superior Court* (1949) 34 Cal.2d 83, 86; *Morton v. Workers' Comp. Appeals Bd., supra,* 193 Cal.App.3d 924, 927), the purpose of such proceedings is to protect the dignity, authority, or process of the court or tribunal (*Vaughn v. Municipal Court* (1967) 252 Cal.App.2d 348, 358-359) and to provide the court or tribunal with the means of controlling its proceedings. (*Cooper v. Superior Court* (1961) 55 Cal.2d 291, 301; *Lyons v. Superior Court* (1955) 43 Cal.2d 755, 758.) Thus, the WCAB has inherent power to exercise reasonable control over all proceedings before it to ensure the orderly administration of justice, to maintain its dignity and authority, and to punish acts which embarrass or obstruct it in discharge of its duties. (*Mowrer v. Superior Court* (1969) 3 Cal.App.3d 223, 230.)

Where the object of contempt prodeedings is to vindicate the dignity, authority, or process of the court, the proceedings are quasi-criminal in character even though they arise from, or are ancillary to, a civil proceeding. (*Morelli v. Superior Court* (1969) 1 Cal.3d 328, 333; see *Morton v. Workers' Comp. Appeals Bd. supra,* 193 Cal.App.3d at p. 927 ["In California all contempt proceedings are quasi-criminal in nature."].)[4]

In any event, whether the applicable statutory limitation be attributed to Penal Code section 802 or to Code of Civil Procedure section 340, subdivision 2, neither statute bars the herein

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imprisonment in the state prison shall be commenced within one year after commission of the offense. . . ."

Code of Civil Procedure section 340 provides: "within one year: . . . [¶] (2) An action upon a statute for a forfeiture or penalty to the people of this state. . . ."

[4] We note that Code of Civil Procedure section 1218 provides for imposition of a fine not exceeding $1,000 upon a person found guilty of contempt.

contempt proceedings since, as stated in *Rowen v. Workers' Comp. Appeals Bd., supra*, 119 Cal.App.3d at page 639: "There is no specified statutory limitation of time within which a determination of contempt must be made. In cases of *direct* contempt, the question is one of whether the delay deprived the court of jurisdiction. [Citations.] Thus, a delay of 50 days from the occurrence of the alleged contemptuous conduct until the adjudication proceedings for the contempt was held [citation] to deprive the court of jurisdiction to punish for a direct contempt. '[T]hat rule [, however,] does not apply in the case of an *indirect* contempt proceeding instituted by order to show cause and supported by affidavit.' [Citation.] Rather, in cases of *indirect* contempt of the WCAB we must examine the facts to determine whether it can be said that the WCAB has lost jurisdiction in this matter. [Citation.]" (Emphasis in original.)

The petitioner has the burden of demonstrating that any delay by the WCAB was unreasonable and to petitioner's prejudice. (See *Rowen v. Workers' Comp. Appeals Bd., supra,* 119 Cal.App.3d at pp. 639-640; *Marcus v. Workers' Comp. Appeals Bd., supra,* 35 Cal.App.3d at pp. 604-605.) In *Marcus,* part of the WCAB's delay in the contempt proceedings was due to evaluation of disciplinary proceedings under Labor Code section 4907, and part was due to the attorney's request for time to engage in pretrial discovery. The court did not annul the contempt finding on the basis the WCAB had not proceeded in timely fashion, stating that "in the absence of a showing of prejudice to the petitioner, . . . the delay in instituting the contempt proceedings, partly due to the action of petitioner, was not unreasonable.'" (See *Rowen v. Workers' Comp. Appeals Bd., supra,* 119 Cal.App.3d at pp. 639-640.) In the circumstances here, especially in light of the complex and extensive investigatory process undertaken by the WCAB to ensure the complaints of misconduct by Dr. Crawford were not unfounded before filing contempt charges that might unfairly impugn his reputation and economic well being, Dr. Crawford demonstrated neither unreasonableness nor prejudice, and the WCAB did not lose jurisdiction within the

meaning of the *Rowen* and *Marcus* cases.[5] On the contrary, the lenghty investigatory process was to Dr. Crawford's advantage.

We note further that in *Alpine Palm Springs Sales, Inc. v. Superior court, supra,* 274 Cal.App.2d 524, cited by petitioner as a basis for applicability of the statute of limitations in the instant case, the court stated no statute of limitations had "run against the judicial step of curing the continuously operating effect of the contemptuous act." (*Id.*, at p. 537.) Here, each alleged contemptuous medical report had potentially continuous operating effect throughout trial by the WCJ of the case in which the report was filed, and throughout reconsideration proceedings by the WCAB and review by the Court of Appeal and Supreme Court. The allegations of the accusation here are in essence that the contemptuous acts have disrupted the WCAB's practice and procedure in resolving workers' compensation claims. Under the

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[5] The WCAB states: "It is a policy of the [WCAB] to conduct an investigation of all charges of impropriety against persons involved in [WCAB] proceedings before considering whether an order to show cause regarding contempt should issue. In many cases the charges are determined by the [WCAB] to be unfounded or of insufficient magnitude to merit proceeding in contempt. An investigation is necessary because most of the complaints arise in one or other of the 22 offices located throughout the state where workers' compensation judges conduct their hearings. Certain matters are then referred to the Commissioners for consideration of contempt of the [WCAB], although the majority of the investigations are completed in a relatively short time and may involve only a letter of inquiry, the extent and continuing nature of the complaints concerning Dr. Crawford's psychiatric evaluation reporting and billing practices necessitated the extensive and lengthy investigation before the accusation, citation and order to show cause issued.

"The [WCAB] believes that its policy of investigation in these matters is sound in order to guard against hasty action that may unfairly have an adverse effect on the economic well being and reputation of the person against whom a complaint was made. It is only after the [WCAB] investigation determines that there is substance to the complaint and that the orderly processes of the law protecting injured workers is jeopardized if the alleged complaint is true that the order to show cause issues and the matter is set for hearing."

allegations, the alleged contemptuous acts could well have had continuously operating effect until well into the one-year period before the contempt proceedings were instituted.

In this regard, we observe that in the instant review the contempt matter is in essence at the pleading stage, the WCAB having denied petitioner's motion to dismiss the order to show cause and petitioner having sought a writ prohibiting hearing of the charges. Petitioner, of course, has the burden of proving by preponderance of the evidence the affirmative defense based on the statute of limitations. (Lab. Code, §§ 3202.5, 5705.) As above indicated, the allegations of the accusation do not show a statute of limitations defense. It is noteworthy that the WCAB denied petitioner's motion to dismiss as to all counts relating to alleged violations of rule 10606 without prejudice to renewal at the hearing of the alleged contempt. Thus, petitioner has an opportunity to establish his asserted statute of limitations defense at the hearing. On the record before us, there is not a sufficient showing of a statute of limitations defense at this stage of the proceedings to prohibit the WCAB from hearing the alleged contempt.

For the foregoing reasons, we conclude that further proceedings in the contempt matter are not barred by either Penal Code section 802 or Code of Civil Procedure section 340, subdivision (2). (*Rowen v. Workers' Comp. Appeals Bd., supra*, 119 Cal.App.3d 633; *Marcus v. Workmen's Comp. Appeals Bd., supra*, 35 Cal.App.3d 598; *Alpine Palm Springs Sales, Inc. v. Superior Court, supra*, 274 Cal.App.2d 523.)

2. Sufficiency of Accusation

Rule 10606 was adopted by the WCAB pursuant to its power to prescribe reasonable rules of practice and procedure in proceedings before it. (Lab. Code, §§ 5307, 5703.)[6] Thus, by virtue of these statutes and the rules promulgated pursuant thereto, the WCAB is empowered to adopt reasonable rules of practice and

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[6] Labor Code section 5307 provides the WCAB may adopt reasonable rules of practice and procedure. Section 5703 provides the WCAB may receive as evidence and use as proof of any fact in dispute, in addition to sworn testimony, reports of attending or examining physicians.

procedure to regulate and prescribe the nature of proof and evidence in workers' compensation cases.

Rule 10606 (*ante*, fn. 1) requires that physicians who submit medical reports for introduction in evidence in workers' compensation proceedings disclose the name of any person other than the reporting physician who has participated in taking the medical history, in performing the physical examination, or in drafting, composing, or editing the medical report. Failure to comply with this requirement renders the report inadmissible if it is not the report of an examining or attending physician. Rule 10606 does not specifically provide for contempt for failure to comply with its provisions.

The purpose of rule 10606 is stated as follows: "Knowledge of the identity of the persons performing a physical examination of a workers' compensation claimant is extremely important to both the finder of fact and the parties in a workers' compensation setting. The person who performs the physical examination makes crucial judgments as to the validity of a claimant's complaints and symptoms. The finder of fact and the parties are entitled to know that person's identity so that they may weigh his or her qualifications and reputation, and may have the opportunity for cross-examination. If a workers' compensation judge or the [WCAB] receives a report signed by a physician which does not otherwise disclose that the physician's opinions stated in that report are based in part upon the findings of a physical examination not performed by the reporting physician, then the judge or the [WCAB] would reasonably conclude that the signing physician had performed the physical examination, and would therefore be misled about a crucial issue." (*In re Nussdorf* (1981) 46 Cal.Comp.Cases 189, 192, fn. 3 (in bank).)

The *Nussdorf* rationale is likewise applicable to the WCAB's need to identify persons who assist in writing medical reports, in obtaining medical histories, and in providing treatment, especially in the esoteric discipline of psychiatry, which offers the least opportunity for reliance on objective findings of trauma and in which the impressions of the medical examiner at each stage of the examination are critical to the final diagnosis. Where, as here, the final medical report is based on a cursory examination by the

psychiatrist, the report is useless and a waste of time for the WCJ who must rely on medical reports in determining the issues in a given case.[7] It is noteworthy that in litigation of injured workers' claims for workers' compensation benefits, the medical evaluation report is a crucial element of proof, if not the most crucial element, considered by the WCJ in deciding the issues.

As to petitioner's assertion that rule 10606 is not an order subject to contempt under Code of Civil Procedure section 1209, we note that rule 10606 is a rule of practice and procedure adopted pursuant to statutory authorization pertaining to the orderly conduct of proceedings before the WCAB; and inexcusable failure to comply with it constitutes unlawful interference with the proceedings of the WCAB within the meaning of section 1209. (*Cantillon v. Superior Court* (1957) 150 Cal.App.2d 184, 187-188; cf. *United States v. Marthaler* (2d Cir. 1978) 571 F.2d 1104, 1105 ["Intentional violation of a rule of court can be found to be a contempt of court."])

Nor is there merit to petitioner's further assertion that rule 10606 is insufficient to apprise one of the possibility of a contempt citation for violating its provisions. Although rule 10606 does not specify contempt as a sanction for noncompliance, WCAB rule 10562 (Cal. Code Regs., tit. 8, ch. 4.5, § 10562) regarding failure to appear at a hearing similarly does not specify contempt as a sanction; yet, failure to comply with rule 10562 can result in a contempt finding. (*In re Hustedt* (1976) 41 Cal.Comp.Cases 501; writ den.; Cal. Workers' Compensation Practice (Const.Ed.Bar 1985) § 6.38, p. 217.)

As to petitioner's assertion the affidavits are technically deficient in several respects, we note an affidavit need not state all the facts upon which the WCAB relied in deciding to issue the order to show cause regarding contempt; it need only make a prima facie showing of the elements of contempt. (*In re Morelli* (1970) 11 Cal.App.3d 819, 832-833.) Those elements are that the court

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[7] It would appear from the record that Dr. Crawford's review of the 50 to 80 medical evaluation reports signed by him each week would be cursory at best. This is further substantiated by the glaringly inconsistent factual statements in the reports he signed in the two *Kelley* cases.

made a lawful order; the person cited for contempt had knowledge or notice of the order; and the person was able to comply, yet willfully disobeyed the order. (See *Warner v. Superior Court* (1954) 126 Cal.App.2d 821, 824; Cal. Judges Benchbook, Civil Trials (1981) Contempt Power, § 11.55, pp. 374-375.)

Under Code of Civil Procedure section 1211.5, a defect or imperfection in form that does not prejudice a substantial right of the accused on the merits cannot affect the trial, order, judgment, or other proceeding; and no order or judgment of conviction will be set aside for a pleading error in the affidavit or statement, unless, after examining the entire case, including the evidence, the court finds that the error complained of has resulted in a miscarriage of justice. We note that in enacting section 1211.5, the Legislature evidenced an intent that contempt proceedings be adjudicated on the merits and not be set aside because of technical defects in the initiating affidavits. (*Reliable Enterprises, Inc. v. Superior Court* (1984) 158 Cal.App.3d 604, 617.)

Support for ~~an~~ order to show cause in re contempt may be provided by a combination of documents (*In re Morelli, supra*, 11 Cal.App.3d at p. 828), and the supporting documents need only make a prima facie showing of contemptuous conduct. (*Id.*, at pp. 830, 832-833.) "Clearly, the purpose of the rule that all of the elements of the commission of a contempt of court should be shown in the papers submitted for the purpose of securing an order requiring the alleged contemner to come before the court and show cause why he should not be adjudged in contempt for his disobedience is to satisfy the court that it has reason to put its compulsive power in motion, that it would have jurisdiction to act by way of calling the alleged contemner before it and inquiring into his conduct, and that it would not be doing so unwarrantedly to the inconvenience of the court and the person involved. A prima facie showing . . . should be sufficient to satisfy that rule with respect to any particular element of contempt which might be under consideration." (*Id.*, at pp. 832-833.)

Here, Dr. Crawford's factually substantiated misconduct in disregarding rule 10606 in filing medical evaluation reports, as well in some instances filing false reports, constitutes a prima facie showing he has interfered with the WCAB's authority,

process, and proceedings, as well as with the WCAB's primary function under the constitutional mandate (Cal. Const., art. XIV, § 4) that the WCAB adjudicate workers' compensation claims "expeditiously, inexpensively, and without incumbrance of any character."

Dr. Crawford's assertion he did not have knowledge of the requirements of rule 10606 is specious in light of the fact he has been submitting medical evaluation reports in workers' compensation proceedings since 1978 and in light of his 1986 deposition testimony he had "heard" of rule 10606. The record here establishes a prima facie showing that Dr. Crawford had the requisite knowledge of rule 10606.

We conclude the affidavits and supporting papers establish a prima facie showing of contempt justifying issuance of the order to show cause within the meaning of Code of Civil Procedure section 1209 and the authorities cited herein.

3. Res Judicata and Collateral Estoppel

In 1986 when findings, if any, were made by the WCJ who referred the matter of possible contempt by Dr. Crawford to the WCAB, the established law was that only the WCAB or any member thereof must adjudicate contempt and that a WCJ lacked power to do so. (Lab. Code, § 134; *Morton v. Workers' Comp. Appeals Bd., supra*, 193 Cal.App.3d 924; *Marcus v. Workers' Comp. Appeals Bd., supra*, 35 Cal.App.3d 598.) Thus, any finding or determination by the WCJ as to contempt is null and void for lack of jurisdiction of the WCJ, and cannot serve as a basis for invocation of res judicata or collateral estoppel as to counts 35 and 36 (or as to any of the counts).[8]

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[8] Effective Jaunary 1, 1989, Labor Code section 5309 was amended to provide that the WCAB "may, in accordance with rules of practice and procedure which it shall adopt . . . direct and order a workers' compensation judge: . . . [¶] (c) To issue . . . all necessary process in proceedings for direct and hybrid contempt in a like manner and to the same extent as courts of record. . . ." (Stats. 1988, ch. 222, No. 5 West's Cal. Legis. Service, p. 696.) This amendment is apparently the Legislature's response to the holding in *Morton v. Workers' Comp. Appeals Bd., supra*, 193 Cal.App.3d 924, and *Marcus v. Workers' Comp. Appeals Bd., supra*,

4. Prohibition as Remedy

Prohibition is an appropriate remedy to restrain threatened further contempt proceedings by the WCAB. (See Code Civ. Proc., §§ 1102, 1103; *Morelli v. Superior Court, supra*, 1 Cal.3d 328 [peremptory writ of prohibition and peremptory writ of mandate denied as to order to show cause re contempt proceedings to vindicate the dignity and authority of the superior court]; *City & County of S.F. v. Superior Court* (1959) 53 Cal.2d 236, 244-245; *Farnham v. Superior Court* (1961) 188 Cal.App.2d 451, 456 ["... the trial court is without jurisdiction to punish these petitioners for contempt upon the showing made and the trial court should be prohibited from proceeding further with the contempt proceedings under order [to show cause] involved"].)

Before our issuance of the alternative writ of the prohibition herein, the matter had been set for hearing before a WCAB commissioner pursuant to the order to show cause. As previously indicated, the WCAB denied the motion as to all counts relating to alleged violation of rule 10606 without prejudice to renewal at the hearing of the alleged contempt. Thus, petitioner has an opportunity to renew his motion at the hearing. In any event, we conclude there is a prima facie showing of alleged contempt sufficient to provide the WCAB with jurisdiction to hear the charges in the accusation pursuant to the order to show cause. Petitioner has an adequate remedy at law to defend against the charges at the hearing.

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35 Cal.App.3d 598, limiting the exercise of contempt power to "the board or any member thereof" (Lab. Code, § 134), and is indicative of the Legislature's intent the WCAB have and exercise the contempt power of a court of record to protect its process in adjudicating workers' compensation claims.

The alternative writ of prohibition is discharged, and the petition for a peremptory writ of prohibition or in the alternative for a writ of mandate is denied.

Certified for Publication

Spencer, P.J.

We concur:

Hanson (Thaxton), J.

Ortega, J.

Appendix B

Workers' Compensation Appeals Board
State of California
Case Misc. #185

In Re Alleged Contempt of
Byron Daniel Crawford, M.D.
Respondent

Minutes of Hearing

Place and Time:	Santa Monica, California, July 29, 1988, 9:00 a.m.
Judge:	Donna A. Little, Commissioner
Reporter:	Larry L. Fleischer
Appearances:	Workers Compensation Appeals Board By: Jeff Dalcerro, Esq. Special Prosecutor
	Patterson, Belknap, Webb & Tyler By: Donald G. Norris, Esq. Counsel for Respondent
Also Present:	Robert M. Plascove, Representative for Professional Consultation Services, Inc.

No Witnesses
No Exhibits

Record: As to the motion to dismiss, the motion is granted as to Counts 33 and 34. Those Counts are ordered dismissed. The motion is denied as to all other Counts, without prejudice, however, to renew the motion at the conclusion of the hearing with regard to the alleged section 10606 violations; and as to the motion to strike, the ruling will be deferred; and as to the request to take judicial notice, the special prosecutor is ordered to indentify those portions of the records to which his request applies and to file an amended request on or before August 8, 1988.

Dispostion: The matter is continued to September 13, 1988, at 9:00 a.m. for a full-day hearing.

Served Counsel of Record: Donna Alyson Little
By: LF Date: 7-29-88 Commissioner - WCAB

Appendix C

Office of the Clerk
Court of Appeal
State of California

Second Appellate District
Robert N. Wilson, Clerk

Division: 1 Date: 10/21/88

Patterson, Belknap, Webb & Tyler
Donald G. Norris
1875 Century Park East
Suite #950
Los Angeles, CA 90067

Re: Crawford, Byron Daniel M.d.
vs.
W.c.a.b.
2 V B036621
Los Angeles No. MISC185

The Court:

The petition for writ of Review is denied.

Appendix D

Order Granting Review After Judgment by the Court of Appeal

Second Appellate District, Division One,
No. BO36621, SOO7716

In the Supreme Court of the State of California

In Bank

Crawford,
Petitoner,

v.

Workers' Compensation Appeals Board et al.,
Respondents.

Petition for review Granted. The matter is transferred to the Court of Appeal, Second Appellate District, Division One, with directions to issue an alternative writ to be heard before that court when the proceeding is ordered on calendar.

_____
Chief Justice

MOSK
_____
Associate Justice

PANELLI
_____
Associate Justice

ARGUELLES
_____
Associate Justice

KAUFMAN
_____
Associate Justice

_____
Associate Justice

_____
Associate Justice

Appendix E

Order Denying Review

After Judgment by the Court of Appeal
Second Appellate District, Division One, No. B036621
S007716

In the Supreme Court of the State of California

In Bank
Byron Daniel Crawford, M. D.,

Petitioner

v.

Workers' Compensation Appeals Board,

Respondent

Petition for review Denied.

Broussard, J. is of the opinion the petition should be granted.

LUCAS
Chief Justice

Appendix F

Second Appellate District, Division One, No. B036621
S007716

In the Supreme Court of the State of California

In Bank

Byron Daniel Crawford, M. D.,

Petitioner

v.

Workers' Compensation Appeals Board,

Respondent

The request for an order directing depublication of the opinion in the above entitled case is denied.

LUCAS
Chief Justice

Appendix G

In the Court of Appeal of the State of California

Second Appellate District

Division One

No. B036621
(W.C.A.B No. Misc. 185)

Bryon Daniel Crawford, M.D.,
Petitioner,

v.

Workers' Compensation Appeals Board,
Repondent.

Order Modifying Opinion
and Denying Rehearing

Filed
June 12, 1989

The Court:

It is ordered that the opinion filed herein on June 13, 1989, be modified in the following particulars:

On page 23, line 13, footnote number 9 is added after the word "hearing."

At the bottom of page 23, the following is added:

> 9. In his petition for rehearing, Dr. Crawford contends the court has prejudged the facts pertaining to his alleged guilt and section 134 is unconstitutional.
>
> We again note this contempt matter is at the pleading stage only; we have limited our discussion to the allegations and charges in the supporting papers as establishing a prima facie showing of contempt to justify issuance of the order to show cause; we have concluded the alleged facts establish a prima facie showing of contempt sufficient to warrant a

hearing of the charges in the accusation pursuant to the order to show cause; and Dr. Crawford has an adequate remedy at law to defend against the charges at the hearing where the facts pertaining to his alleged guilt will be judged.

As to the constitutionality of section 134, we reiterate that the Legislature, pursuant to the constitutional grant of plenary power (Cal. Const., art. XIV, § 4), has vested judicial powers relating to workers' compensation law in the WCAB (Lab. Code, § 111), including the power to issue all necessary process in proceedings for contempt in like manner and to the same extent as courts of record (Lab. Code, § 134), and this contempt power has been recognized by the courts. (*Hustedt v. Workers' Comp. Appeals Bd.* (1981) 30 Cal.3d 329, 345; *Morton v. Workers' Comp. Appeals Bd., supra*, 193 Cal.App.3d at p. 928; *Rowen v. Workers' Comp. Appeals Bd., supra*, 119 Cal.App.3d at p. 639; *Marcus v. Workmen's Comp. Appeals Bd., supra*, 35 Cal.App.3d at p. 604.) Petitioner asserts that since two of the seven members of the WCAB need not be attorneys at law (Lab. Code, § 112) and since a jail sentence is a possible penalty for contempt (Code of Civ. Proc., § 1218), the section 134 grant of contempt power denies him due process of law under *Gordon v. Justice Court* (1974) 12 Cal.3d 323 in that a non-attorney judge may not preside over criminal cases involving possible jail sentences. Even if *Gordon* applies to contempt proceedings (cf. *Hustedt v. Workers' Comp. Appeals Bd., supra*, 30 Cal.3d at p. 347, fn. 15), the WCAB has fairly and reasonably construed sections 112 and 134 as requiring that only attorney members of the WCAB may hear and determine contempt matters and has assigned Commissioner Donna Alyson Little, an attorney licensed to practice law in California (see News Briefs (1987) 15 Cal. Workers' Comp. Rptr. 151; 1 Martindale-Hubbell Law Directory (121st ed. 1989) Cal. Lawyers, p. 827) to hear the alleged contempt. Section 134 is not unconstitutional as applied.

This modification does not effect a change in the judgment.

The petition for rehearing is denied.

Appendix H

Court of Appeal of the State of Californa

for the Second Appellate District

Division: 1

Patterson, Belknap, Webb & Tyler
Donald G. Norris
1875 Century Park East
Suite # 950
Los Angeles, CA 90067

Re: Crawford, Byron Daniel M.d.
vs.
W.c.a.b.
2 Civil B036621
Los Angeles No. MISC185

* * Remittur Notice * *

Notice is hereby given that the Remittitur has been issued this date and that the opinion, decision or order entered in the above entitled cause on 06/13/89 is now final.

* * Petition Denied After Alternative Writ Issued. * *

☐ Appellant ☐ Respondent to recover costs.

☐ Each party to bear own costs.

☒ Costs are not awarded in this proceeding.

ROBERT N. WILSON, Clerk

By:
Deputy Clerk

[Seal]

Sep 25, 1989

No. 89-884

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1989

BYRON DANIEL CRAWFORD, M.D.,
Petitioner,

v.

WORKERS' COMPENSATION APPEALS BOARD,
Respondent.

**On Petition For Writ Of Certiorari To
The California Court Of Appeal,
Second Appellate District, Division One**

RESPONDENT'S BRIEF IN OPPOSITION

RICHARD W. YOUNKIN*
WILLIAM B. DONOHOE
NEIL P. SULLIVAN
455 Golden Gate Avenue, # 2154
San Francisco, CA 94102
Telephone: (415) 557-2250

**Counsel of Record*

Counsel for Respondent

[illegible] INC. • 100 [illegible] ST. • S.F., CA 94103 • (415) 864-2300

QUESTIONS PRESENTED

1. If, as petitioner argues, the state contempt proceedings against him are criminal as a matter of federal constitutional law, is petitioner's petition untimely under Rule 20.1 because it was filed more than 60 days after the California Supreme Court's judgment?

2. Where petitioner never specifically asserted a federal due process claim during the state proceedings, did petitioner properly raise a federal question?

3. Where California statutory and case law provides that violations of judicial rules of practice and procedure, including rules of the Workers' Compensation Appeals Board, may constitute contempt, did petitioner have fair warning that his violation of Board Rule 10606 could result in contempt?

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No. 89-884

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1989

BYRON DANIEL CRAWFORD, M.D.,
Petitioner,

v.

WORKERS' COMPENSATION APPEALS BOARD,
Respondent.

On Petition For Writ Of Certiorari To
The California Court Of Appeal,
Second Appellate District, Division One

RESPONDENT'S BRIEF IN OPPOSITION

Respondent, the Workers' Compensation Appeals Board of the State of California (hereinafter, the Board or WCAB), respectfully requests that this Court deny the petition for writ of certiorari, which seeks review of the opinion of the California Court of Appeal, Second Appellate District, Division One, in this case. That opinion is reported at 213 Cal.App.3d 156, ____ Cal. Rptr. ____ (1989).

STATEMENT OF THE CASE

Petitioner is a psychiatric expert witness who, through an alter ego corporation, has been providing medical evaluation reports in workers' compensation cases in California since 1978. The corporation employs 20 to 30 persons, including psychologists, to take medical histories and to write the 50 to 80 reports generated by

the corporation each week. All of the reports, however, are signed solely by petitioner.

In 1986, several persons brought to the Board's attention certain alleged deficiencies in petitioner's reports. On April 29, 1988, after a lengthy and complex investigation, the Board issued a 106-page accusation, citation and order to show cause (hereinafter, "OSC") charging petitioner with 36 counts of contempt.

In essence, 31 of the 36 counts of contempt were based upon petitioner's alleged violations of Board Rule 10606. In relevant part, Board Rule 10606 provides:

> "If any person other than the physician who has signed the report has participated in the examination of the injured employee or in the preparation of the report, the name or names of such persons and their role shall be set forth, including the name [or names] of [the] person or persons who have taken the history, have performed the physical examination, [or] have drafted, composed or edited the report in whole or in part." California Code of Regulations, title 8, § 10606.

As to these 31 counts, it was alleged that petitioner willfully failed to identify the persons who took the medical histories and who prepared, or assisted in preparing, the medical reports submitted in several workers' compensation cases in 1985 and 1986; and/or that petitioner willfully misrepresented that he alone took the medical histories and prepared the reports.

Following the issuance of the OSC, petitioner filed a motion to dismiss it. Among other things, petitioner argued that Board Rule 10606 "is not sufficiently definitive to serve as a basis for contempt." In so arguing, petitioner cited California authority only. He did not refer to the Due Process Clause of the Fourteenth Amendment, nor did he otherwise specify that he was raising a federal due process claim. Petitioner's motion was denied.

Thereafter, petitioner filed a petition for writ of prohibition and/or mandate with the California Court of Appeal. Although petitioner again argued that Board Rule 10606 "is not sufficiently definitive to serve as a basis for contempt," he again relied upon

California authority only, and again failed to assert with particularity that he was raising a federal due process claim. The petition for writ of mandate and/or prohibition was summarily denied.

Subsequently, petitioner sought review by the California Supreme Court. In his petition for review, petitioner in essence reiterated his assertion that Board Rule 10606 is not sufficiently definitive to serve as a basis for contempt. Again, however, petitioner neither cited to the Due Process Clause of the Fourteenth Amendment, nor otherwise indicated that he was bringing a federal due process claim. The California Supreme Court granted review and transferred the matter to the Court of Appeal with directions to issue an alternative writ.

Following this transfer, the California Court of Appeal issued the opinion which is the subject of petitioner's instant petitioner of writ of certiorari. With respect to petitioner's due process argument, the Court of Appeal said:

> "Nor is there merit to petitioner's further assertion that rule 10606 is insufficient to apprise one of the possibility of a contempt citation for violating its provisions. Although rule 10606 does not specify contempt as a sanction for noncompliance, WCAB rule 10562 (Cal. Code Regs., tit. 8, ch. 4.5, § 10562) regarding failure to appear at a hearing similarly does not specify contempt as a sanction; yet, failure to comply with rule 10562 can result in a contempt finding. (*In re Hustedt* (1976) 41 Cal.Comp.Cases 501, writ den.; Cal. Workers' Compensation Practice (Cont. Ed. Bar 1985) § 6.38, p. 217.)" *Crawford v. Workers' Comp. Appeals Bd., supra*, 213 Cal. App.3d, at 169.

Nowhere in the Court of Appeal's discussion of petitioner's due process claim is there any reference to the federal Constitution.

Thereafter, petitioner sought rehearing by the California Court of Appeal. Yet, once more, petitioner nowhere indicated that his due process claim was in any way predicated on the federal, as opposed to the state, Constitution. Rehearing was denied, although the opinion was modified in respects not pertinent here.

Finally, petitioner sought review by the California Supreme Court for the second time. However, in making his due process claim, he again neither referred to the Due Process Clause of the Fourteenth Amendment nor otherwise specifically asserted a federal due process claim. Review was denied by the California Supreme Court on August 31, 1989.

REASONS WHY THE PETITION SHOULD BE DENIED

I

IF, AS PETITIONER ARGUES, THE STATE CONTEMPT PROCEEDINGS AGAINST HIM ARE CRIMINAL AS MATTER OF FEDERAL CONSTITUTIONAL LAW, THEN HIS PETITION IS UNTIMELY UNDER RULE 20.1 BECAUSE IT WAS FILED MORE THAN 60 DAYS AFTER THE CALIFORNIA SUPREME COURT'S JUDGMENT.

Although a petition for writ of certiorari in a civil case may be filed within 90 days after the highest state court's entry of judgment, 28 U.S.C. § 2101 (c), a petition for writ of certiorari in a criminal case must be filed within 60 days after that time. U.S. Sup. Ct. Rule 20.1, 28 U.S.C.; see also, R.L. Stern, E. Gressman & S. M. Shapiro, *Supreme Court Practice*, § 6.1, p. 301 (6th ed. 1986).

Here, petitioner argues that for purposes of determining his federal due process claim, the state contempt proceedings against him are criminal. Petition for Writ of Certiorari, at 8-9. Yet, if this is assumed to be true,[1] then petitioner's petition for writ of certiorari is untimely under Rule 20.1. That is, the petition for writ of certiorari was not filed until November 29, 1989, well over

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[1] But see, *Blackmer v. United States*, 284 U.S. 421, 440, 52 S.Ct. 252, 256, 76 L.Ed. 375 (1932); *Myers v. United States*, 264 U.S. 95, 103, 44 S.Ct. 272, 273, 68 L.Ed. 577 (1923) ["contempt proceedings . . . are sui generis—neither civil actions nor prosecutions for offenses, within the ordinary meaning of those terms—and [are] exercises of the power inherent in all courts to enforce obedience, something they must possess in order to properly perform their functions"].

60 days after the California Supreme Court's August 31, 1989 denial of petitioner's petition for review. Moreover, the period for applying for a writ of certiorari was not extended by a Justice of this Court. U.S. Sup. Ct. Rule 20.1, 28 U.S.C.. Accordingly, the petition for certiorari should be denied or dismissed as untimely.

II

BECAUSE PETITIONER NEVER SPECIFICALLY ASSERTED A FEDERAL DUE PROCESS CLAIM DURING THE STATE CONTEMPT PROCEEDINGS, HE FAILED TO PROPERLY RAISE A FEDERAL QUESTION.

It is essential to the jurisdiction of the Supreme Court under 28 U.S.C. § 1257 that a substantial federal question was properly raised or necessarily decided in the state court proceedings. *Illinois v. Gates*, 462 U.S. 213, 217-222, 103 S.Ct. 2317, 2321-2324, 76 L.Ed. 2d 527 (1983); *Dept. of Mental Hygiene of California v. Kirchner*, 380 U.S. 194, 197, 85 S.Ct. 871, 873, 13 L.Ed. 2d 753 (1965); R. L. Stern, E. Gressman & S. M. Shapiro, *Supreme Court Practice* (6th ed. 1986), § 3.19, p. 144. Although a litigant need not follow any particular form in framing a federal question to a state court, "it is well settled in this court that it must be made to appear that some provision of the Federal, as distinguished from the state, Constitution was relied upon, and that such provision [was] set forth." *New York Central & Hudson River Railroad Co. v. City of New York*, 186 U.S. 269, 273, 22 S.Ct. 916, 917, 46 L. Ed. 1158 (1901). Thus, where a litigant in state court asserts that "due process of law" was violated, without specifically referring the state court to the Due Process Clause of the Fourteenth Amendment, this Court will regard the litigant's "due process" contention as referring solely to the state Constitution, and not to the federal Constitution, where the state Constitution contains a due process clause. *Bowe v. Scott*, 233 U.S. 658, 664-665, 34 S.Ct. 769, 771, 58 L. Ed. 1141 (1914); *Consolidated Turnpike Co. v. Norfolk & Ocean View Railway Co.*, 228 U.S. 326, 331-333, 33 S. Ct. 510, 512-513, 57 L. Ed. 857 (1912); *Thomas v. Iowa*, 209 U.S. 258, 262-263, 28 S.Ct. 487, 488-489, 52 L. Ed. 782 (1907); *Miller v. Cornwall R. Co.*, 168 U.S. 131,

134-135, 18 S.Ct. 34, 35, 42 L.Ed. 409 (1987).[2] The California Constitution, of course, contains a due process clause. (Cal. Const., art. I, §§ 7, 15).[3]

Here, petitioner did raise a due process issue in the state contempt proceedings. In so doing, however, he did not cite to the Due Process Clause of the Fourteenth Amendment of the federal Constitution nor otherwise specifically assert a federal due process claim. Petitioner, therefore, must be regarded as having invoked in state court only the due process clause of the California Constitution. *Bowe, supra; Consolidated Turnpike Co., supra; Thomas, supra; Miller, supra.* Accordingly, no substantial federal question was raised, and this Court lacks jurisdiction to consider petitioner's due process claim.[4]

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[2] *Cf., Henderson v. Georgia,* 295 U.S. 441, 442-443, 55 S.Ct. 794, 794-795, 79 L. Ed. 1530 (1934) [a general assertion in state court that a statute was in violation "of the Constitution of the United States," without a specific assertion that the statute contravened the due process clause of the Fourteenth Amendment, did not properly raise a federal due process question]; *Harding v. Illinois,* 196 U.S. 78, 86-88, 25 S.Ct. 176, 178-179, 49 L. Ed. 394 [same]; *Capital City Dairy Co. v. Ohio,* 183 U.S. 238, 248, 22 S.Ct. 120, 124, 46 L. ed 171 (1901) [same].

[3] Article I, section 7, of the California Constitution provides in relevant part that "[a] person may not be deprived of life, liberty, or property without due process of law . . . "

Article I, section 15, of the California Constitution provides in relevant part that "[p]ersons may not twice be put in jeopardy for the same offense, be compelled in a criminal cause to be a witness against themselves, or be deprived of life, liberty, or property without due process of law."

[4] It should be noted that not only did petitioner fail to raise any federal due process issue, but also that the California Court of Appeal did not purport to decide any federal due process question.

III

PETITIONER HAD FAIR WARNING THAT HIS VIOLATION OF BOARD RULE 10606 COULD RESULT IN CONTEMPT (1) BECAUSE IT HAS LONG BEEN HELD IN CALIFORNIA THAT THE FAILURE TO COMPLY WITH A JUDICIAL TRIBUNAL'S RULE PERTAINING TO THE ORDERLY CONDUCT OF PROCEEDINGS BEFORE IT MAY BE PUNISHABLE AS CONTEMPT, (2) BECAUSE, CONSISTENT WITH THIS PRINCIPLE, THE BOARD HAS CONSISTENTLY HELD THAT VIOLATIONS OF ITS RULES MAY CONSTITUTE CONTEMPT, AND (3) BECAUSE, PRIOR TO THE INSTANT CASE, THE BOARD SPECIFICALLY INDICATED THAT PHYSICIANS SUBMITTING MEDICAL REPORTS WITHOUT PERFORMING THE PHYSICAL EXAMINATION, TAKING THE MEDICAL HISTORY, OR REVIEWING THE MEDICAL RECORDS WOULD BE SUBJECT TO CONTEMPT.

The essence of petitioner's argument is that he did not have fair warning that a violation of Board Rule 10606 could result in contempt. Petition for Writ of Certiorari, at 8-12. Petitioner, however, did have fair warning.

Subdivision (a) of section 1209 of the California Code of Civil Procedure specifically provides, in relevant part, that:

> "The following acts or omissions . . . *are contempts of the authority of the court:*
>
> * * *
>
> "(4) Abuse of the process or proceedings of the court . . . ;
>
> "(5) Disobedience of any lawful judgment, order or process of the court; [or]
>
> * * *
>
> "(8) Any other unlawful interference with the process or proceedings of the court . . . " California Code of Civil Procedure section 1209, subdivision (a), emphasis added.

Section 1209 (a) and its statutory predecessors have contained these provisions for over 100 years.[5] Moreover, under California Labor Code sections 134 and 132, the Board since its inception has been empowered to punish contempts of its authority pursuant to California Code of Civil Procedure section 1209.

Petitioner implies that he could not know that his failure to comply with Board Rule 10606 could subject him to contempt under California Code of Civil Procedure section 1209(a). Yet, Board Rule 10606 is a duly adopted rule of practice and procedure. See, California Labor Code section 5307; *Crawford v. Workers' Comp. Appeals Board, supra*, 213 Cal.App.3d, at 167-168; *Kaiser Foundation Hospitals v. Workers' Comp. Appeals Bd.* (Gregory) 87 Cal.App.3d 336, 357, 151 Cal. Rptr. 368 (1978). And it has long been the law in California that a violation of a judicial tribunal's rule of practice and procedure, which rule pertains to the orderly conduct of proceedings before it, can be contemptuous under California Code of Civil Procedure section 1209(a) if that violation constitutes a significant abuse of or interference with the tribunal's process or proceedings. *Cantillon v. Superior Court*, 150 Cal.App.2d 184, 187-188, 309 P.2d 890 (1957); cf., *United States v. Marthaler*, 571 F.2d 1104, 1105 (2d Cir. 1978). Moreover, the Board has long held, as summarily affirmed by the California appellate courts, that violations of its rules of practice and procedure can constitute contempt under California Code of Civil Procedure section 1209.[6] Indeed, in *In re*

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[5] When California Code of Civil Procedure section 1209 was first enacted in 1872, it contained all of the language quoted above, and that language has been retained through each of its subsequent amendments. Cal. Stats. 1891, ch. 9, § 1, p. 6; Cal. Stats. 1907, ch. 255, § 1, p. 319; Cal. Stats. 1939, ch. 979, § 1, p. 2731; Cal. Stats. 1975, ch. 836, § 2, p. 1896; Cal. Stats. 1982, ch. 510, § 2, p. 2286.

[6] See, e.g., *In re McDonnell Douglas Corp.*, 44 Cal.Comp.Cases 1070 (Board en banc, 1979), writ den. sub nom. *Keeney v. Workers' Comp. Appeals Bd.*, 46 Cal.Comp.Cases 39 (1981) [failure to timely serve medical reports, in violation of Board Rules 10608 and 10615, Cal. Code Regs., tit. 8, §§ 10608, 10615, is contempt of Board]; *In re State Comp. Ins. Fund*, 40 Cal. Comp. Cases 674 (Board en banc, 1975), writ den. sub nom. *State Comp. Ins. Fund v. Workers' Comp. Appeals Bd.*, 41 Cal.

Nussdorf, 46 Cal.Comp.Cases 189 (Board en banc, 1981), the contempt case which formed the basis for Board Rule 10606, the Board specifically declared (1) that it was misleading for a physician to submit a medical report under his signature and letterhead when he had not performed the injured worker's physical examination, taken the medical history, or reviewed the medical records; (2) that this practice would not be condoned by the Board in the future; and (3) that this opinion would serve as a guide for what would henceforth be expected of physicians submitting medical evaluation reports in workers' compensation cases in California.

Accordingly, it cannot be said that petitioner lacked fair warning that his alleged violations of Board Rule 10606 could result in contempt, or that, in upholding the Board's contempt proceedings, the California Court of Appeal was making an "ex post facto" interpretation of Board Rule 10606, retroactively making its violation subject to contempt.

Comp. Cases 312 (1976) [same]; *In re Lee*, 44 Cal. Comp. Cases 331 (Board en banc, 1979) [ex parte communication in violation of Board Rule 10324, Cal. Code Regs., tit. 8, § 10324, and failure to seek judge's prior authorization for consultative permanent disability rating in violation of Administrative Director Rule 9758, Cal. Code Regs., tit. 8, § 9758, is contempt of Board]; *cf., In re Hustedt*, 41 Cal. Comp. Cases 501 (Board en banc, 1976) [failure to appear at Board conference, which is a violation of Board Rule 10562, Cal. Code Regs., tit 8, § 10562, is contempt of Board].

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be dismissed or denied.

Respectfully submitted,

RICHARD W. YOUNKIN*
WILLIAM B. DONOHOE
NEIL P. SULLIVAN
455 Golden Gate Avenue, # 2154
San Francisco, CA 94102
Telephone: (415) 557-2250
Counsel for Respondent

**Counsel of Record*

ENTRY OF APPEARANCE

SUPREME COURT OF THE UNITED STATES

No. 89 - 884

Byron Daniel Crawford, M.D.
[Petitioner]

v.

Workers' Comp. Appeals Bd.
[Respondent]

The clerk will enter my appearance as Counsel of Record for the Workers' Compensation Appeals Board, who in this Court is Respondent.

I certify that I am a member of the Bar of the Supreme Court of the United States:

/s/ Richard W. Younkin
Mr. Richard W. Younkin
Workers' Compensation Appeals Board
455 Golden Gate Avenue, # 2154
San Francisco, CA 94102
Telephone: (415) 557-2250

CERTIFICATE OF SERVICE

I, Richard W. Younkin, a member of the Bar of this Court, hereby certify that on this 27th day of December, 1989, three copies of Respondent's Brief In Opposition in the above-entitled case were mailed, first class postage prepaid, to Robin B. Johansen, Esq., 220 Montgomery Street, # 800, San Francisco, California, 94104, the cousel of record for petitioner herein. I further certify that all parties required to be served have been served.

/s/ *Richard W. Younkin*
Richard W. Younkin
455 Golden Gate Avenue, # 2154
San Francisco, CA 94102
Telephone: (415) 557-2250
Counsel of Record for Respondent

No. 89-884

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1989

BYRON DANIEL CRAWFORD, M.D.,
Petitioner,

vs.

WORKERS' COMPENSATION APPEALS BOARD,
Respondent.

On Petition for Writ of Certiorari to the California Court of Appeal, Second Appellate District, Division One

PETITIONER'S REPLY BRIEF

* ROBIN B. JOHANSEN
JOSEPH REMCHO
MARTIN BUCHANAN
REMCHO, JOHANSEN & PURCELL
220 Montgomery Street, #800
San Francisco, California 94104
Telephone: 415/398-6230

EDWARD M. ROSENFELD
DONALD G. NORRIS
PATTERSON, BELKNAP, WEBB & TYLER
1875 Century Park East, #950
Los Angeles, California 90067
Telephone: 213/557-1000

Counsel for Petitioner
* *Counsel of Record*

January 9, 1990

BOYANE OF SAN FRANCISCO INC. • 190 NINTH ST. • S.F. CA 94103 • (415) 864 2300

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No. 89-884

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PETITIONER'S REPLY BRIEF

INTRODUCTION

Pursuant to Supreme Court Rule 22.5, petitioner Byron Crawford hereby submits this reply brief in support of his petition for writ of certiorari. This reply brief addresses only the following two issues raised for the first time in the WCAB's opposition brief: (1) the timeliness of the petition; and (2) whether petitioner properly raised the federal due process issue in the state courts.

ARGUMENT

I. THE PETITION WAS TIMELY FILED BECAUSE PETITIONER IS NOT SEEKING REVIEW OF A JUDGMENT IN A CRIMINAL CASE

The WCAB argues that if the contempt proceedings against Dr. Crawford are criminal in nature for purposes of deciding the federal due process claim, then the 60-day time limit for filing a writ of certiorari from a "judgment in a criminal case" must apply. Supreme Court Rule 20.1. This argument conveniently ignores the fact that petitioner is not in fact seeking review of a final judgment in his criminal contempt case, but rather seeks review of the judgment denying his civil petition for writ of prohibition and/or mandate to prohibit the Board from proceeding to trial. This writ proceeding is a separate and independent civil action that was brought by petitioner as an original proceeding in the California Court of Appeal pursuant to California Code of Civil Procedure sections 1084 *et seq.* and 1102 *et seq.* It is therefore subject to the 90-day time limit for filing a petition for writ of certiorari in civil cases. 28 U.S.C. § 2101(c).

The mere fact that the civil writ proceeding involves an underlying criminal action does not mean that the 60-day time limit for criminal cases is applicable. This Court has held, for example, that the 90-day time limit for *civil* actions applies to both a petition for writ of habeas corpus and a motion to vacate, set aside, or correct a criminal sentence under 28 U.S.C. section 2255. *Heflin v. United States,* 358 U.S. 415, 418 n.7 (1959). The Court reasoned that such a proceeding "is not a proceeding in the original criminal prosecution but an independent civil suit." *Ibid.* This logic applies with even greater force to the civil writ proceeding at issue here.

In any event, even if petitioner were seeking review of a final judgment in his criminal contempt prosecution, the 90-day time limit for civil cases would apply. 28 U.S.C. § 2101(c). Though criminal in nature, this proceeding was initiated by an Order to Show Cause issued by the WCAB under California Code of Civil Procedure sections 1208 *et seq.* It was not initiated by a grand jury indictment, it is not being prosecuted by a district attorney, and

the contempt is not being charged under the separate criminal statute contained in California Penal Code section 166. Thus, this is not a "criminal case" within the meaning of Supreme Court Rule 20.1.[1]

II. PETITIONER PROPERLY RAISED THE FEDERAL DUE PROCESS ISSUE IN THE STATE COURTS

The WCAB concedes that "petitioner did raise a due process issue in the state contempt proceedings." Respondent's Brief in Opposition at 6. However, the Board contends that the federal issue was not properly preserved because petitioner did not specifically assert a federal, as opposed to a state, due process claim. *Ibid.* This assertion is incorrect both as a matter of law and fact.

It is well settled that Supreme Court jurisdiction over state court cases that raise issues of federal law "does not depend on citation to book and verse." *Eddings v. Oklahoma,* 455 U.S. 104, 113-14 n.9 (1982).

> No particular form of words or phrases is essential, but only that the [federal] claim . . . be brought to the attention of the state court with fair precision and in due time. And if the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately preserved.
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> *New York ex rel. Bryant v. Zimmerman,* 278 U.S. 63, 67 (1928).

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[1] Even if the court concludes that Supreme Court Rule 20.1 does apply here, petitioner respectfully requests that the 60-day time limit be extended by 30 days, as expressly permitted by the rule. *See also Schacht v. United States,* 398 U.S. 58, 63-64 (1970) (holding that the time limit for criminal cases is "not jurisdictional and can be relaxed by the Court in the exercise of its discretion when the ends of justice so require"). Petioner filed this petition in the good faith belief that the 90-day statutory time limit of 28 U.S.C. section 2101(c) applied to this civil writ petition.

In *Taylor v. Illinois*, 484 U.S. 400, 108 S. Ct. 646 (1988), this Court held that the petitioner had properly preserved his Sixth Amendment compulsory process claim even though his initial appeal to the Illinois appellate court had not expressly asserted such a claim. The Court relied upon the fact that the petitioner had "cited and relied upon, through a quotation from an Illinois Appellate Court decision, two of our Compulsory Process Clause cases." *Id.* at 651 n.9. Based upon "the authority cited by petitioner and the manner in which the fundamental right at issue has been described and understood by the Illinois courts," the Court found it "appropriate to conclude that the constitutional question was sufficiently well presented to the state courts to support our jurisdiction." *Ibid.*[2]

The reasoning of *Taylor v. Illinois* is directly applicable here. Although petitioner never *expressly* indicated whether he was relying upon the federal or the state due process clause, or upon both, the record taken as a whole makes it clear that the federal issue was raised.[3] In one of his Court of Appeal briefs, for example, immediately after referring to "the constitutional guarantee of due process of law," petitioner quoted the following passage from this Court's *federal* due process decision in *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926):

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[2] In other decisions, this Court has assumed jurisdiction based upon even more vague allusions to a federal constitutional issue in the state courts. *See, e.g., Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 159 n.5 (1980); *Taylor v. Kentucky*, 436 U.S. 478, 482 n.10 (1978).

[3] The Court of Appeal also did not specify whether its decision was based upon the federal or state due process clause or both. *See* Appendix A to Petition for Writ of Certiorari, at A-12. For the reasons stated in the text below, it is reasonable to conclude that the Court of Appeal intended to resolve both the federal and state due process issues. *Cf. Webb's Fabulous Pharmacies, Inc. v. Beckwith, supra*, 449 U.S. at 159 n.5 (holding that even though it was unclear whether a federal constitutional issue had been raised, and the Supreme Court of Florida had not mentioned the federal Constitution in its opinion, "[w]e are satisfied that the Supreme Court of Florida upheld the statute against both federal and state constitutional challenges").

> [A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.
>
> (Quoted in Petition for Rehearing and/or Modification of Opinion at 23).[4]

In his second petition for review by the California Supreme Court, petitioner again relied upon a federal Supreme Court decision to illustrate the proposition that "fundamental notions of due process" require warning "'of what the law intends to do if a certain line is passed.'" Petitioner's Reply to Answer to Petition for Review at 6 (quoting *McBoyle v. United States*, 283 U.S. 25, 27 (1931)). He also specifically cited both the federal and state constitutional provisions against ex post facto laws by way of analogy to his due process claim. *Id.* at 6 n.3 (citing U.S. Const., art. I, section 9(3); Cal. Const., art. I, section 9).

In the same brief, petitioner cited another California Supreme Court decision that also expressly invoked *federal* due process principles. Id. at 6-7 (citing *People v. Weidert*, 39 Cal.3d 836, 218

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[4] Although *Connally* was cited for the first time in the petition for rehearing, this Court has held that a federal issue is properly preserved even if raised for the first time in a petition for rehearing unless the state has a "strictly or regularly followed" rule against it. *Hathorn v. Lovorn*, 457 U.S. 255, 262-65 (1982). As the leading commentator on California law has recognized, the California rule against raising new issues in a petition for rehearing "may be relaxed for good cause" and "is sometimes disregarded without any stated reason." B. Witkin, 9 *California Procedure*, Appeal, § 684 at p.657 (3d ed. 1985) (citing California cases). Moreover, the rule does not apply to jurisdictional issues, which may be raised at any time. *Unruh v. Truck Insurance Exchange*, 7 Cal.3d 616, 622, 102 Cal.Rptr. 815, 498 P.2d 1063 (1972); *Sime v. Malouf*, 95 Cal.App.2d 82, 116, 212, P.2d 946 (1949). Whether particular acts constitute contempt is considered a jurisdictional issue in California. *In re Ciraolo*, 70 Cal.2d 389, 394, 74 Cal.Rptr. 865, 450 P.2d 241 (1969); *In re Baroldi*, 189 Cal.App.3d 101, 108, 234 Cal.Rptr. 286 (1987); *In re Stanley*, 114 Cal.App.3d 588, 591, 170 Cal.Rptr. 755 (1981); *Mowrer v. Superior Court*, 3 Cal.App.3d 223, 229, 83 Cal.Rptr. 125 (1969).

Cal.Rptr. 57, 705 P.2d 380 (1985)). In *Weidert*, the court held that due process principles of fair notice prohibit a retroactive judicial enlargement of a criminal statute. Drawing an analogy to the state and federal constitutional provisions against ex post facto laws, the court declared:

> Although by their terms, the ex post facto clauses apply only to legislative acts, both this court and the United States Supreme Court have incorporated the principle upon which the prohibition rests into the due process clauses of the state *and federal* Constitutions.
>
> *Id.* at 850 (emphasis added) (citing *Marks v. United States*, 430 U.S. 188, 191-92 (1977); *Bouie v. City of Columbia*, 378 U.S. 347 (1964); *Keeler v. Superior Court*, 2 Cal.3d 619, 634, 87 Cal.Rptr. 481, 470 P.2d 617 (1970)).

Even if petitioner had not expressly cited these federal due process cases, however, his federal claim would still have been adequately preserved because of the "manner in which the fundamental right at issue has been described and understood by the [California] courts. . . ." *Taylor v. Illinois, supra*, 108 S. Ct. at 651 n.9. In analyzing the "fair warning" requirement of the state due process clause, California courts have routinely applied federal due process precedents. Indeed, the leading California Supreme Court case on the issue relied almost exclusively upon the federal due process decisions of this Court, simply declaring that "[t]he law of California is in full accord." *Keeler v. Superior Court, supra*, 2 Cal.3d at 634. Other California "fair warning" decisions have also relied upon federal due process principles and cases. *See, e.g., People v. Weidert, supra*, 39 Cal.3d at 849-50; *Burg v. Municipal Court*, 35 Cal.3d 257, 269-70, 198 Cal.Rptr. 145, 673 P.2d 732 (1983); *People v. Superior Court (Hartway)*, 19 Cal.3d 338, 345, 138 Cal.Rptr. 66, 562 P.2d 1315 (1977), *cert. denied & appeal dismissed*, 466 U.S. 967 (1984); *In re Baert*, 205 Cal.App.3d 514, 517-22, 252 Cal.Rptr. 418 (1988), *cert. denied*, 109 S. Ct. 3242 (1989); *Clingenpeel v. Municipal Court*, 108 Cal.App.3d 394, 397-98, 166 Cal.Rptr. 573 (1980).

In light of the fact that California courts simply apply federal due process law in analyzing "fair warning" cases under the state

Constitution, petitioner's reliance upon general principles of "due process" in the state courts was sufficient to apprise the state courts of his federal claim. When combined with the explicit citations to federal due process authorities, the unmistakable conclusion is that the federal claim was properly presented and preserved for review by this Court.[5]

Even if the federal issue had not been properly presented, however, the current trend is to view the rule "as merely a prudential restriction that does not pose an insuperable bar to our review." *Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71, 108 S.Ct. 1645, 1651 (1988). In this case, where the substance of petitioner's federal claim was clearly before the state courts, the claim should not be barred by the prudential rules of this Court.

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[5] None of the cases cited by the WCAB involved explicit citations to federal due process cases, and none arose in an area of the law where the state courts simply applied federal due process law in analyzing state due process claims. *See* cases cited in Respondent's Brief in Opposition at 5-6.

CONCLUSION

The petition for writ of certiorari was timely, and the federal issue was properly raised and preserved in the state courts. The WCAB's attempt to erect technical barriers to review where none exist should be rejected, and certiorari should be granted to address the federal due process issue on its merits.

January 9, 1990

Respectfully submitted,

ROBIN B. JOHANSEN
JOSEPH REMCHO
MARTIN BUCHANAN
REMCHO, JOHANSEN & PURCELL
220 Montgomery Street, #800
San Francisco, California 94104
Telephone: 415/398-6230

EDWARD M. ROSENFELD
DONALD G. NORRIS
PATTERSON, BELKNAP, WEBB & TYLER
1875 Century Park East, #950
Los Angeles, California 90067
Telephone: 213/557-1000
Counsel for Petitioner